

STATE OF MICHIGAN
COURT OF APPEALS

RAAD KELLO,

Plaintiff,

and

SEVENTY FIFTH GRAND, INC.,

Plaintiff-Appellant,

v

WIRELESS TOYZ FRANCHISE, LLC, JOE
BARBAT, RICHARD SIMTOB, JSB
ENTERPRIZES, INC., and JACK BARBAT,

Defendants-Appellees.

UNPUBLISHED

November 17, 2011

No. 299128

Oakland Circuit Court

LC No. 2009-098041-CK

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Plaintiff-appellant, Seventy Fifth Grand, Inc. ("plaintiff"), appeals by right from the trial court's grant of summary disposition in favor of defendants. Plaintiff also appeals the court's subsequent denial of plaintiff's motion for reconsideration. We affirm the summary disposition on plaintiff's franchise claims (Counts I-III), because the trial court correctly concluded that plaintiff lacks standing to sue under the Michigan Franchise Investment Law, MCL 445.1501 *et seq.* We reverse the summary disposition on plaintiff's common law claims (Counts IV-VIII) and remand for further consideration, because the trial court's decision on summary disposition did not properly address the common law claims.

Plaintiff's lawsuit arose out of Raad Kello's unprofitable operation of retail wireless communication stores.¹ Acting as president of R&B Communications, Inc., Kello signed a franchise agreement with defendant Wireless Toyz to open a store. Kello then signed a second franchise agreement to open a second store. Both stores were later closed or sold. Kello and

¹ Kello is not a party to this appeal.

plaintiff sued defendants, asserting violations of the Michigan Franchise Investment Law (MFIL) and asserting common law claims.

Defendants filed a motion for summary disposition under MCR 2.116(C)(5), (7), and (8). The trial court found there was no express or implied franchise relationship between plaintiff and defendants, and that as such, plaintiff could not establish an injury in fact. The trial court then concluded that plaintiff lacked standing to sue, citing *Mich Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280; 737 NW2d 447 (2007) (*Nestlé*).

On appeal, plaintiff first argues that it has standing as an implied franchisee. We review de novo the trial court's summary disposition on the issue of standing. *Rohde v Ann Arbor Pub Sch*, 265 Mich App 702, 705; 698 NW2d 402 (2005). We first note that subsequent to the trial court's decision, our Supreme Court issued *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010) (*Lansing Schools*), overruling the rules of standing in *Nestlé*. 487 Mich at 371 n 18. We apply the *Lansing Schools* holding to resolve issues of standing. See *Ader v Delta College Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2011 (Docket No. 290583). According to *Lansing Schools*, a litigant has standing to sue when the litigant has a "legal cause of action." *Lansing Schools*, 487 Mich at 372.²

Here, plaintiff has not demonstrated that it has a "legal cause of action" arising under the MFIL. The MFIL creates a cause of action for "the person purchasing the franchise." MCL 445.1531(1), (3); see *Franchise Mgt Unlimited, Inc v America's Favorite Chicken*, 221 Mich App 239, 250; 561 NW2d 123 (1997). The MFIL defines franchise:

(3) "Franchise" means a contract or agreement, either express or implied, whether oral or written, between 2 or more persons to which all of the following apply:

(a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor.

(b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate.

² *Lansing Schools* provides an alternate ground to establish standing if the litigant "has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Schools*, 487 Mich at 372 (emphasis added). In our view, this alternate ground is unavailable where, as here, the plaintiff is excluded from the cause of action provided in the statute. The statutory scheme of the MFIL does *not* confer standing on plaintiff.

(c) The franchisee is required to pay, directly or indirectly, a franchise fee.
[MCL 445.1502(3)(a)-(c).]

According to the plain terms of the MFIL, the cause of action is available only to a person who purchased a franchise as defined by the MFIL. The record in this case demonstrates that plaintiff is not the person who purchased the franchise. Neither of the franchise agreements at issue in this case referenced plaintiff, nor does plaintiff's name appear on the agreements. Therefore, plaintiff has no legal cause of action pursuant to the MFIL.

Plaintiff maintains that it obtained a franchise via an implied agreement, through its course of dealing with defendants. In support, plaintiff relies in part on California law. We find no need to examine California law, because the terms of the MFIL are plain and unambiguous. See *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005) (statutory interpretation is inappropriate when the terms of a statute are clear). Moreover, this Court has held that the determination of whether an agreement is a franchise is based upon the "circumstances present at the time of the offer or sale [of the franchise]." *Hamade v Sunoco, Inc*, 271 Mich App 145, 159; 721 NW2d 233 (2006). Accordingly, plaintiff's subsequent course of dealing with defendants did not create an implied franchise. The trial court correctly determined that there was no franchisor/franchisee relationship between plaintiff and defendants, and that absent the requisite statutory relationship, plaintiff lacked standing to pursue the franchise claims. Similarly, the trial court was within its discretion in denying plaintiff's motion for reconsideration on those grounds. See, e.g., *Estate of Luckow v Luckow*, 291 Mich App 417, ___; ___ NW2d ___ (Docket No. 294398, January 27, 2011) (trial court's decision on motion for reconsideration is reviewed for abuse of discretion).

The lack of a franchise relationship, however, does not necessarily preclude plaintiff from demonstrating that it has standing to pursue its common law claims against defendants. The trial court's decision regarding plaintiff's standing appears to be based solely upon the lack of a franchise relationship.³ Given that the determination of standing must be resolved according to the *Lansing Schools* precedent, and that the trial court did not address the common law claims in its ruling, we must remand to the trial court for consideration of issues of standing on the common law claims and of the other issues on those claims presented in the parties' summary disposition materials.

³ Defendants argue on appeal that plaintiff has abandoned its common law claims on appeal. We disagree. In the trial court, the parties briefed the common law claims with regard to MCR 2.116(C)(8) (failure to state a claim), as well as the issues of standing. The trial court appears to have granted summary disposition solely for lack of standing, on the ground that there was no franchise relationship between the parties. Consequently, plaintiff's questions presented on appeal addressed the franchise issues. Plaintiff addressed the common law claims in its reply brief on appeal. We cannot determine from the existing record whether the trial court considered the standing issues with regard to the common law claims.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell